# Military Whistleblower Protection Act Training for Supervisors

March 2000

# STATUTORY BASIS

Title 10, United States Code, Section 1034

Similar laws apply to Federal civil servants and

to non-appropriated fund employees (Navy Exchange, MWR, etc.)

# CONSTITUTIONAL BASIS

# WHY?

Because we have all taken an oath to support and uphold the United States Constitution.

Because higher-level decision-makers need to know when things are not going well - bad news does not always travel uphill in a hierarchical organization like the military.

# SUBSTANTIVE PROTECTIONS

Unlawful to prevent or restrict military

member from communicating with a Member of Congress, an Inspector

General, etc.

# WHAT CAN YOU SAY?

"My door is always open to you."
(and mean it!)

"If you see something wrong around here, please bring it to my attention and give me the opportunity to fix it."

You must NOT say that bringing the matter to the chain of command is a condition precedent to contacting Congress or an IG.

# REPRISAL PROHIBITED

Unlawful to take an unfavorable personnel

action, or to withhold a favorable personnel

action, because a military member has

made or prepared a protected communication.

# THREE QUESTIONS

- Did the complainant make or prepare a protected communication?
- Was an unfavorable personnel action taken (or a favorable personnel action withheld) AFTER the protected communication?
- Were the responsible management officials aware of the protected communication?

# BIG QUESTION

Does the EVIDENCE ESTABLISH that the same personnel action would have been taken (withheld) even if the complainant had not made or prepared the protected communication?

Management official has the burden of proof.

# WHAT IS A PROTECTED COMMUNICATION?

- Any lawful communication to a Member of Congress or an IG (regardless of subject)
- Includes communication by a third party (spouse, parent, etc.) on behalf of a military member
- Includes cases where management official believes a member made a protected communication

# WHAT IS A PROTECTED COMMUNICATION?

A communication to a member of a DOD audit, inspection, investigation, or law enforcement organization or ANY OTHER PERSON (including a person in the chain of command) designated under Component regulations or administrative procedures to receive such communications (see following slide)

# TOPIC OF THE PROTECTED COMMUNICATION

Any topic, if made to a Member of Congress or an IG.

Otherwise, must communicate information that member reasonably  believes evidences a violation of law or regulation, mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health and safety

# DOES THE UNDERLYING ALLEGATION HAVE TO BE SUBSTANTIATED?

No, only “reasonable belief” by the complainant at the time he/she made the allegation. Reasonable belief is generally presumed.

WE DO NOT INVESTIGATE COMPLAINANTS.

# WHAT IS AN UNFAVORABLE PERSONNEL ACTION?

- Anything that affects or has the potential to affect that member's current position or career.

- Includes promotion; disciplinary or corrective action; transfer; performance evaluation; decision on pay, benefits or training; or referral for mental health evaluation (MHE).

# WHAT IS AN UNFAVORABLE PERSONNEL ACTION?

- Includes favorable actions withheld.

- Includes threatening to take an unfavorable personnel action, or threatening to withhold a favorable personnel action, even if the threat is not carried out.

# KNOWLEDGE OF THE COMMUNICATION

In a place like this, it is likely that everybody knows or suspects that someone has written his/her Senator or otherwise made a protected communication.

# GAME PLAYING

We recognize that some complainants make protected communications because they suspect that an unfavorable personnel action is coming.

Don’t be unnerved by this strategy.  Just make sure that you are doing the right thing, for the right reasons, and that you are documenting the basis for your actions.

# NEED FOR DOCUMENTATION

If you are aware that an individual in your unit has made a protected communication, and if you find it necessary to take an unfavorable action (downgraded FITREP, etc.), you must be able to DOCUMENT that you took the action for proper reasons, and not as a reprisal. You should be documenting anyway, but this is especially important after the individual has made a protected communication.

# MENTAL HEALTH EVALUATIONS

Use of mandatory referral for mental health evaluation (MHE) as a reprisal is EXPRESSLY FORBIDDEN. See DOD Directive 6490.1 of 01 OCT 97 (revised version).

# MENTAL HEALTH EVALUATIONS

Using MHE as reprisal really gets the attention of Congress, because it is reminiscent of human rights abuses in the USSR (putting political dissidents in insane asylums).

DON’T EVEN THINK OF USING MHE THIS WAY.

# VALUE OF THE MENTAL HEALTH EVALUATION

The MHE can be very valuable. Don’t mess it up by trying to use an MHE referral as reprisal.

# DON’T BE RELUCTANT TO REFER MEMBER FOR MHE WHEN WARRANTED

1997 rewrite to DOD Directive added “Requirement that commanding officers be alert to potentially dangerous service members and take actions aimed at reducing danger to both the service member and the general public.”  This was a direct response to the 1996 tragedy at Fort Bragg (soldier killed 16 other

# MENTAL HEALTH RESOURCES HERE AT NSA MID-SOUTH

Military: Branch Medical Clinic (901) 874-6151

Civilians: Contact the Civilian Employee Assistance Program (CEAP) toll free at (800) 677-5327. (Services provided are Outpatient Referrals, Outpatient Counseling, Group Therapy, Intensive Outpatient Program, Inpatient

# POINTS OF CONTACT

**Department of Defense Inspector General**

1-800-424-9098

**Naval Inspector General**

1-800-522-3451

**BUPERS/NPC Inspector General**

874-3032 (On Base) 1-877-414-5357 (Off Base)